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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re ROGER R. et al., Persons Coming Under the
Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Appellant,

v.

MARISSA C. et al.,

Defendants and Respondents.

F044149

(Super. Ct. Nos. JD096354,
JD096355, JD096356)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Peter A.
Warmerdam, Juvenile Court Referee.

B.C. Barmann, Sr., County Counsel, and Susan M. Gill, Deputy County Counsel,
for Plaintiff and Appellant.

Konrad S. Lee, under appointment by the Court of Appeal, for Marissa C.,
Defendant and Respondent.

Maureen L. Keaney, under appointment by the Court of Appeal, for Roger R.,
Defendant and Respondent.

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* Before Levy, Acting P.J., Cornell, J., and Dawson, J.

Appellant Kern County Department of Human Services (department) appeals from a Welfare and Institutions Code¹ section 366.26 order issued by the juvenile court on September 5, 2003, implementing a permanent plan of legal guardianship. We conclude substantial evidence does not support the court's order and reverse.

STATEMENT OF THE CASE AND FACTS

We are presented with the unusual case of the department rather than the parents challenging the juvenile court's permanency planning order. The central issue raised is whether termination of parental rights is sufficiently detrimental to the subject minors, who are indisputably adoptable to overcome the statutory preference for adoption contained in section 336.26, subdivision (c)(1). The instant juvenile court found sufficient detriment to support a permanent plan of legal guardianship rather than adoption. On review, we concur with the department that substantial evidence does not support the court's finding. Accordingly, we will reverse and remand.

The subjects of this dependency appeal were removed in February 2002 at the ages of four years, three years and three months by the department from the custody of their mother Marissa because two of the children sustained multiple bruising. Marissa shared custody of all three children with Roger, her estranged boyfriend and the presumed father of the three-and four-year-old children. Neither Marissa nor Roger could provide a reasonable explanation for the bruises. In addition, they both have significant histories of drug abuse. Consequently, the department filed dependency petitions on behalf of the children.

The juvenile court ordered the children detained and the department placed them in foster care. The court also ordered supervised visitation for both parents to occur twice weekly for one hour. The court subsequently assumed dependency jurisdiction and

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

ordered a plan of reunification that required both parents to complete several counseling programs and submit to random drug testing.

Over the next 12 months, Marissa and Roger regularly visited their children and completed some components of their case plans. However, they consistently tested positive for drugs; Marissa for methamphetamine and Roger for marijuana and PCP (phencyclidine). In light of their minimal compliance, the department recommended the court terminate reunification services for both parents. On May 8, 2003, at a contested 12-month status review hearing, the juvenile court adopted the department's recommendation, ordered reunification services terminated and set a section 366.26 hearing.

In its permanency plan review, the department reported that while Marissa and Roger maintained regular visitation and shared a loving relationship with the children, the children were more strongly attached to the foster parents with whom they had been placed since April 2003. Since the children were adoptable and the foster parents wanted to adopt them, the department recommended the juvenile court terminate parental rights and free the children for adoption.

Marissa and Roger challenged the department's recommendation at a contested section 366.26 hearing conducted on September 5, 2003. At trial, no one disputed the children's adoptability or their closeness to both their biological and foster parents. Rather, the issue was whether the nature of the children's relationship with Marissa and Roger constituted an exception to the statutory mandate of section 366.26, subdivision (c)(1) requiring the juvenile court to terminate parental rights where the children are deemed adoptable.

Social worker Selena Wilson testified she had been the assigned caseworker for approximately one year and observed the children with Marissa on six occasions and with the foster parents on seven to eight occasions. She described the relationship between the children and Marissa and between the children and their foster parents as "very loving"

and “nurturing.” She also testified that the two oldest children refer to both Marissa and their foster mother as “Mom.” As to the nature and extent of parent/child bonding, she believed the children were more bonded to their foster parents. She explained that the children visited with Marissa in a playroom and that Marissa usually brought them something to eat from McDonalds. While the children were always excited to see Marissa and displayed love and affection for her, Wilson believed the children regarded Marissa merely as someone who brought them food and played with them for an hour and that their interaction with her would always be positive as long as it occurred in this “playful” setting. In contrast, she observed the children with their foster parents in the structured environment of the foster home. She described the children’s relationship with the foster parents as a “responsive, positive interactive relationship where [the children] respect and understand the role of their caretakers as their nurturers, their disciplinarians, their providers, [and as people] that keep them safe. So with that, they respond in total to them for all of those needs.”

Adoption social worker Michael McMahan testified he was assigned to supervise visitation between the children and their biological parents. In the six months since his assignment, he observed 20 visits between Marissa and the children and 15 separate visits between Roger and the children. The children were always excited to see Marissa and Roger and were happy in their parents’ presence. He also testified both Marissa and Roger maintained control of the children at all times. The two oldest children referred to Marissa and Roger as “Mom” and “Dad” and on Mother’s Day presented Marissa with cards they made at school. The children freely separated with their parents after visitation and McMahan never heard the children ask either Roger or Marissa when they were going home with them. He had only one brief opportunity to observe the children with their foster mother. They called her “Mom” and were happy to see her.

Marissa and Roger testified to the love and affection they shared with their children. Roger testified the children refer to him as “Dad” and told him they wanted to

return to his home. Marissa testified the children initiate physical contact with her and express their love for her. She also testified that the children look to both her and the foster parents for parental love and affection and that she was extremely happy with the care they received with the caretakers.

County counsel argued that the benefit of maintaining the biological parent/child relationships in this case did not outweigh the permanency of adoption and therefore did not satisfy the exception to adoption pursuant to section 366.26, subdivision (c)(1)(A). Counsel for Marissa and Roger countered, emphasizing the significant period of time the two oldest children lived with their parents before they were removed and the children's loving relationship with their biological parents. The juvenile court found the children adoptable and concluded Marissa and Roger's continuing drug abuse precluded any prospect of returning the children to their custody. On the other hand, the court acknowledged the existence of a loving relationship between Marissa and Roger and their children. In balancing the children's need for permanency with the benefit of continuing their relationships with Marissa and Roger, the court gave every indication that the evidence weighed in favor of terminating parental rights. The court stated:

"I have parents that I can't return these children to . . . because unfortunately although the parents have had an opportunity to go to counseling and have gone through some counseling, we still haven't made a dent in that substance abuse problem. And unfortunately, the information that we have doesn't give me any hope that's going to change. So long-term foster care is not an option that's really available to the Court since the children are adoptable. And there is no hope at least at this point to see these children going back with the parents.

"So the question really is since the children are adoptable, and there is a relationship between the parents and the children, that's certainly got a number of positives included. We see the children running to the parents; we see them eager when they get to the visits; we see them interacting in a positive way and fashion. As far as whether or not that's spurred on by the presents of food, items or toys, it's my recollection that the Department encourages parents to bring exactly such things when they visit, so I don't know that can be held to shed any negative light on how the children react.

“The issue is what benefits the children the most? Does it benefit the children more to end this relationship and have them adopted or does it benefit them to continue this relationship? Based on what the parents have done and what they haven’t done, the only relationship that these children will have with their parents is one of periodic visitors. There’s no indication, no inclination that this will ever be anything more.”

Then, in an inexplicable about-face and without making any express findings pursuant to section 366.26, subdivision (c)(1), the court ordered the children placed in legal guardianship and appointed the foster parents as the legal guardians. County counsel raised no objections. This appeal ensued.

DISCUSSION

The department argues the juvenile court erred in not terminating Marissa and Roger’s parental rights and therefore its order implementing a permanent plan of legal guardianship must be reversed. Respondent Roger argues the department waived appellate review of the court’s order by failing to object at trial. While it is generally the case that points not urged in the trial court cannot be raised on appeal, the contention that a judgment is not supported by substantial evidence is an exception to the rule. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623.) Therefore, the waiver doctrine does not apply. Moreover, on the merits, we concur with the department.

Where, as here, the children’s adoptability is undisputed and the court previously determined they could not be returned to their parents’ custody, the juvenile court must terminate parental rights at the section 366.26 hearing and order the children placed for adoption unless the court finds a compelling reason for determining that termination would be detrimental to the child under one of the exceptions contained in section 366.26, subdivision (c)(1). The first of these, and the one appellant claims the court misapplied, states “The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(A).) The parents have the burden of proving that the exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345.) If the court finds that any

of the enumerated exceptions apply and therefore termination of parental rights would be detrimental to the child, the court must state its reasons in writing or on the record. (§ 366.26, subd. (c)(1).)

To establish the “benefit from continuing the [parent/child] relationship” exception in section 366.26, subdivision (c)(1)(A), the parents must demonstrate more than pleasant visitation, frequent and loving contact and even more than the existence of an emotional bond with the child. (*In re Andrea R.* (1999) 75 Cal.App.4th 1108, 1109.) Rather, the parents must show that they occupy a parental role in the child’s life. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.) They must further show that the parent/child relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The juvenile court then “balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Ibid.*) On appeal, we review the juvenile court’s finding that termination of parental rights would be detrimental to the child for substantial evidence. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425.)

In this case, substantial evidence does not support the juvenile court’s apparent finding that the benefit to the children in maintaining a relationship with Marissa and Roger outweighed the legislative preference for adoption. While there is no doubt that these young children acknowledged Marissa and Roger as their mother and father, that they shared a loving relationship with them and that they all enjoyed their time together, there is no evidence that Marissa and Roger fulfilled a parental role for their children. Rather, they were, as the juvenile court described them, “periodic visitors” and that is not

enough. The foster parents, on the other hand, were meeting the children's day-to-day needs and offered stability and permanency through adoption. Moreover, the record is completely devoid of any evidence that severing Marissa and Roger's parental rights would be detrimental to the children. Considering the state of the evidence, we cannot discern why the court, after articulating reasons supporting termination of parental rights, ordered legal guardianship instead. Nevertheless, we conclude the evidence was insufficient to support an exception pursuant to section 366.26, subdivision (c)(1)(A) and that the juvenile court erred in not terminating parental rights. Having found insufficient evidence to support the court's order, we need not address appellant's contention that the juvenile court erred in failing to make an express finding of detriment. Accordingly, we reverse and remand.

DISPOSITION

The juvenile court's order issued on September 5, 2003, implementing a permanent plan of legal guardianship is reversed. On remand, the juvenile court is directed to enter a new order terminating parental rights and selecting adoption as the permanent plan.